THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE

CASE NO: 364/2002

In the matter between :

ECKHARD RÖSEMANN Appellant

and

THE GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA Respondent

Before:	**HOWIE, MPATI, STREICHER, CONRADIE & HEHER JJA**
Heard:	**2 SEPTEMBER 2003**
Delivered:	**26 SEPTEMBER 2003**
Summary:	**Advocate – professional misconduct – instruction by an attorney to do all the administrative and preparatory work normally done by an attorney should not be accepted by an advocate – advocates may not sign pleadings and notices of motion in magistrate's court proceedings.**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] I have read the judgment of Heher JA and agree that the appeal should be dismissed.

[2] The court *a quo* found –

2.1 that, in signing the two notices of motion as 'Applikant/Prokureur vir die Applikant' knowing that his capacity was falsely described therein, the appellant was guilty of misconduct;

2.2 that it is not proper for an attorney to 'shuffle off' certain functions onto the shoulders of an advocate by simply briefing the latter to attend to them on his own and that it cannot be proper for counsel to accept such a brief;

2.3 that the furnishing by the appellant of an address for the service of process was improper;

2.4 that the appellant's ignorance (which was a possibility that could not be excluded) that he could not sign the summonses and notices, in itself constituted professional misconduct.

[3] The appellant tried to justify his conduct on the basis that he had been instructed by an attorney. In this regard the court *a quo* found –

3.1 that the court order made by King JP cannot have the effect of permitting the respondent to do what the law prohibits and that the order must accordingly be restrictively interpreted;

3.2 that the appellant could nevertheless not be found guilty of having breached the terms of the order as the order was ambiguous in that it could be interpreted as sanctioning 'the undertaking by the respondent of work normally performed by an attorney, provided that he is instructed to do so by an attorney'.

[4] The appellant received the instructions on which he relied in Cape Town from an attorney in Pretoria. In the one case, involving one of the summonses signed by the appellant, the instruction, dated 18 January 2000, reads as follows:

'Ek het bogemelde kliënt na jou verwys vir konsultasie en advies rakende geld wat sy aan `n ene Wayne Right geleen het en wat hy toe versuim het om op die vervaldatum te betaal.

Help haar asseblief en reik ook dagvaarding uit indien nodig. Aangesien sy in die Kaap is, moet jy ook maar verder met die litigasie aangaan en alles doen om die saak tot finaliteit te bring want ek weet nie wanneer ek weer `n draai in die Kaap sal kan maak nie.

Hou my net asseblief op hoogte.'

[5] In the other case, involving the other summons signed by the appellant, the instruction, dated 24 January 2000, reads as follows:

'Ons verwys na bogemelde en die telefoon gesprek tussen uself en skrywer vandag.

Hiermee word u opdrag gegee om namens ons kliënt Mnr B Ramsauer dagvaarding vir die bedrag van R100 000.00 uit te reik teen Michael Wurbach synde 'n mondelinge ooreenkoms.

Soos bespreek bevestig ons graag dat u fooie direk met die kliënt ooreengekom sal word.

Geliewe ons op hoogte te hou van die vordering en ook versoek ons insae in alle pleitstukke en korrespondensie.'

[6] In the two applications the instructions read as follows:

6.1 'Hiermee word u opdrag gegee om voort te gaan om aansoek te doen om summiere vonnis namens ons teen M Wurbach en stel die nodige beëdigde verklaring op vir Mnr Ramsauer in hierdie verband.'

6.2 'Hiermee word u opdrag gegee om voort te gaan met die opstel van `n *ex-parte* aansoek teen Mnr Wurbach en Overberg Duikers-vereniging (beslagskuldenaar), beëdigdeverklaring, en toe te sien tot liassering. Geliewe ook die verskyning hierin waar te neem.'

[7] Our law recognises a divided profession coupled with the referral system (see *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) 606 (SCA) at 620C-D). In terms of the referral system an advocate may, save in certain exceptional circumstances, not presently relevant, only accept instructions from an attorney. In the *Commissioner, Competition Commission*-case (*loc. cit.*) Hefer AP said in regard to a refusal by the Competitions Commission to

exempt the referral rule of the members of the General Council of the Bar of South Africa from the provisions of the Competition Act 89 of 1998:

'This is the law of the land and the Commission was not entitled to "bend" it.'

[8] In *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 763G Cameron JA said:

'[I]t is in the public interest that there should be a vigorous and independent Bar serving the public, which, subject to judicial supervision, is self-regulated, whose members are in principle available to all, and who in general do not perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice.'

[9] There can in my view be no doubt that one of the objects of the referral practice is to ensure that administrative and preparatory work in litigation is handled by attorneys who are trained and organised to do so, thereby enabling advocates to concentrate their skills on the craft of forensic practice. It follows that a proper use of the referral practice serves the public interest. It follows, furthermore, on the other hand, that to allow advocates to accept instructions by attorneys to conduct litigation on behalf of a client from beginning to end i.e. to do all the administrative and preparatory work in respect of litigation would not serve the public interest and would constitute an abuse of the referral practice.

[10] The instructions relied upon by the appellant were to do all the administrative and preparatory work normally done by an attorney. I, therefore, agree with the court *a quo* that the instructions were not proper

instructions and that they should not have been accepted by the appellant. Like the Competition Commission, attorneys and advocates are not entitled to 'bend' the referral rule. By accepting the instructions the appellant acted contrary to the interests of his profession and contrary to the public interest.

[11] There is no merit in the appellant's contention that a finding against him would be contrary to the provisions of s 22 of the Constitution. In terms of the section citizens have the right to choose their professions freely. There has been no interference with the appellant's freedom to choose his profession. He chose to be an advocate not an attorney. Section 22 provides, furthermore, that the practice of a profession may be regulated by law. As pointed out above the referral practice is neither arbitrary nor irrational as contended by the appellant, relying on the statement by Cameron JA in *De Freitas* at 763A that '[r]egulation of professional practice will certainly have to be rational and non-arbitrary to pass constitutional scrutiny'.

[12] I agree with the court *a quo* that the order made by King JP should not be interpreted so as to authorise the appellant to do all work normally performed by an attorney as long as he is instructed by an attorney. There is certain work normally done by an attorney which can be done by an advocate if instructed by an attorney to do so. In my view on a proper interpretation of the order it prohibits the appellant from doing such work without having been instructed by an attorney. The order does not purport

to authorise the appellant to do anything, it only prohibits him from doing certain things. Furthermore, it is so well established that certain work normally done only by attorneys should not be done by advocates that it could not have been the intention of King JP to authorise the appellant to do such work provided he was briefed by an attorney. There is, therefore, no room for interpreting the order so as to, by implication, grant permission to the appellant to do all work normally done by an attorney provided he is instructed by an attorney.

[13] The appellant applied for the admission of new evidence to the effect that, relying on the court order, he believed that he was authorised to undertake all work normally performed by an attorney if instructed by an attorney. However, it appears from the appellant's answering affidavits that he was, like the respondent, under the impression that the draft order annexed to the respondent's founding affidavit had been made an order of court i.e. that he was not even aware that the court order differed from the draft order. His explanation for not having denied the respondent's allegations as to the terms of the court order and for not having raised the defence he now wishes to raise is unconvincing. I, therefore, agree that the appellant's application to lead new evidence should be dismissed.

[14] Like Heher JA I fully agree with the judgment of a full court of the *Natal Provincial Division in Society of Advocates of Natal v De Freitas and Another* (*Natal Law Society Intervening*) 1997 (4) SA 1134 (N) at

1174-1176 to the effect that, in terms of the magistrates' courts rules, an advocate may not sign pleadings in magistrates' courts proceedings. The reasoning in that judgment applies with equal force to the signing of notices of motion which, in terms of the prescribed form, require a signature by the applicant or his attorney. The judgment could not be ignored by the appellant. His alleged ignorance that he could not sign the summonses and notices of motion itself constituted professional misconduct.

[15] It follows that I agree with the court *a quo*'s findings set out in paragraphs 2.2 to 2.4 above.

[16] For these reasons I agree with Heher JA that the appellant was properly found guilty of unprofessional conduct. I also agree that there are no grounds upon which this court can interfere with the punishment imposed by the court *a quo*. I, therefore, agree with the order proposed by Heher JA.

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STREICHER JA

HOWIE P)
MPATI AP) CONCUR
CONRADIE JA)

HEHER JA:

[1] The appellant has been an admitted advocate since 1997. He was called to the Bar without previous experience as an attorney although he had worked for several years as a legal adviser to a company. Instead of joining the Cape Society of Advocates and setting up chambers in proximity to his colleagues with all the advantages which that offers in learning by collegial example and advice he elected to become a member of the Independent Association of Advocates of South Africa and to practise from an office in Bellville.

[2] In 1999 the respondent brought an application before the Cape High Court to have the appellant's name struck off the roll of advocates for accepting work from clients without the intervention of an attorney. The application was settled at court. An order by consent was made by King JP in the following terms:

'1. The Respondent shall not from the date of this order accept instructions directly from a member of the public or, without being instructed by an attorney, undertake any work normally performed by an attorney.'

[3] During 2000 complaints were received by the Cape Bar Council from a magistrate and a member of the Cape Bar. They related to the manner in which the appellant had allegedly involved himself in the running of proceedings in the magistrate's court. This led the respondent to bring a further application to disbar the appellant.

[4] The evidence that the respondent presented to the Cape High Court was essentially to the effect that

(a) the appellant had breached the previous court order by undertaking the work customarily only done by an attorney; and that

(b) the appellant had conducted himself unprofessionally by undertaking work properly that of an attorney only, that he accepted instructions without the intervention of an attorney, that he signed two summonses initiating proceedings in magistrates' courts which bore his own name and address and, in one case, his telephone number and that he signed two notices of motion in a magistrates' court which did not reflect the name and address of an attorney but did carry his own name, address and telephone number.

[5] Thring J (with Cleaver J concurring) found certain of the charges proved. He concluded that the appellant had been guilty of unprofessional conduct and suspended him from practice for a period of two months. The judgment, which sets out the facts and the law with great care, is reported at 2002 (1) SA 235 (C).

[6] Leave was granted by the Court *a quo* to appeal to this Court against the whole of the order.

[7] Before the Court *a quo* the respondent presented its case upon the erroneous assumption that the order made by King JP had been formulated in terms materially different from the reality. Its files apparently contained a number of draft orders and it relied on one which recorded the 'order' as follows:

'3 The respondent acknowledges that he has previously performed those functions normally performed by an attorney and undertakes that he will not from the date of this order:

3.1 take instructions directly from a member of the public, other than through an attorney;

3.2 perform any type of work normally performed by an attorney.'

The respondent alleged that the terms of the settlement between the parties were embodied in this 'order'. The appellant did not deny that averment. The respondent only discovered its error after argument had been completed. Neither party has been able to explain why the order of King JP was actually made in the form which it eventually took. As will appear from what I say hereafter the probability is that the wrong draft was presented to the learned Judge although it is possible that some mangling occurred in transferring the correct draft to the court file. What is important is that the order as made purported to permit the appellant to perform the work of an attorney provided he acted under instructions from an attorney. The Court *a quo* found that such a construction would confer authority which the law prohibited. To that extent the order required a restrictive construction. For the reasons given in para [20] below I agree with that approach.

[8] At the commencement of this appeal the appellant's counsel applied for leave to introduce new evidence in the form of an affidavit from his client. The object was to show that the unprofessional practices attributed to the appellant in the founding affidavit had been carried on by the appellant in

bona fide reliance upon the terms of the order made by King JP and that, as he had at all material times acted on the instructions of an attorney, one Louanda Fourie, (a concession reluctantly made by the respondent in the Court *a quo*) his conduct did not fall foul of the order.

[9] In order to succeed in his application the appellant had to satisfy the tests laid down in *Colman v Dunbar* 1933 AD 141 at 162-3: the circumstances justifying leave to adduce further evidence must be exceptional; that the evidence was not brought forward before must not be owing to any remissness on his part; the evidence must be weighty, material and believable and such that if adduced would be practically conclusive; conditions should not have changed so that the fresh evidence will prejudice the opposite party. Only the last-mentioned requirement is not in issue here.

[10] The appellant would have this Court believe that at all material times since the first order was made he knew of its terms and acted in reliance on them. In this way he seeks to justify what the Court below regarded as unprofessional conduct on his part.

[11] A careful analysis of the appellant's actions before and at the time of the first appeal demonstrates as a probability that he had no belief in the authority of the order and did not rely on it. On the contrary there is little doubt that he thought an order had been made in the terms relied on by the respondent in its founding affidavit. My reasons for these conclusions are set out in paragraphs [12] to [19].

[12] The respondent annexed a copy of a document which reflected an undertaking by the appellant that the respondent thought had been made an order of court. The respondent quoted paragraph 3 of that document. It alleged that the appellant had breached the undertaking given in that paragraph and that 'as such his actions are not only unethical, but his conduct amounts to contempt of court'. To these allegations the respondent answered, citing the same supposed order:

'15.1 Die inhoud hiervan word erken. Dit word erken dat in saaknommer 5151/99 'n voorwaarde van die skikking was, dat die Respondent onderneem om:

"... not from date of this order:

3.1 take instructions directly from a member of the public ...

3.2 perform any type of work normally performed by an attorney."

15.2 Die Respondent eerlikwaar glo dat die Respondent tot op datum die genoemde bevel strik nagekom het en nie op enige wyse die bevel van die Agbare Hof verontagsaam het nie.

16. [Having repeated the substance of para 15.2 the appellant added] ... en nie op enige wyse oneties gehandel het nie.'

The respondent did not expressly or by implication refer to the existence of the order actually made or its terms.

[13] In paragraph 22 of the founding affidavit the Chairman of the Respondent deposed as follows:

'... since the settlement by agreement of the previous application, the Respondent has been aware that, in terms of an order of this Honourable Court to which he consented,

he has been prohibited from performing those functions normally performed by an attorney and undertook that he would not perform such functions. Notwithstanding this, the Respondent has persisted in performing functions normally performed by an attorney. I aver that in doing so, the respondent has shown a fundamental disregard for the rules of the advocate's profession, as well as for an order of this Honourable Court.'

Those allegations demanded an appropriate response. There can be no doubt that if the appellant had been aware of the terms of the order he would have relied on them in meeting the accusation. The literal words of the court order had, ostensibly, put the appellant into a class of his own, authorizing him to practise in a way not open to the general body of advocates. But the appellant, if he knew of it, spurned the opportunity. He answered as follows:

'48.1 Die Respondent ontken dat die Respondent op enige manier voor 23 November 1999 bewus was dat Advokate en lede van die Onafhanklike Vereniging van Advokate van Suid-Afrika ook aan die beletsel onderworpe was dat daar nie direk by die publiek opdragte geneem mag word nie.

48.2 Die Etiese Kodes van hierdie Balie, het inderdaad lede daarvan gemagtig om direk opdragte by die publiek te verkry. Die Respondent submiteer daarom dat die lede van hierdie Balie eers gedurende Maart 2001 kennis gegee is dat alle Advokate nou onderworpe is aan die Reëls van die Applikant.

48.3 Die Respondent submitteer respekvol, dat die Respondent alle pogings aangewend het om te bepaal watter handeling Advokate inderdaad legitiem ingevolge die Reëls van die Applikant mag verrig. Respondent het soos uiteengesit ook Adv Gauntlett persoonlik om hulp en toewysing genader, maar het bloot verneem om eerder die Wetsgenootskap vir inligting te kontak.

48.4 Die Respondent ontken derhalwe respekvol dat die Respondent minagtend teenoor die bevel van die Agbare Hof en die Reëls van die Advokatuur opgetree het.'

Why the appellant who, so he would now have it, believed himself entitled to do any and all work of an attorney under a brief to that effect, would have tried to ascertain the scope of the ethical rules observed by the respondent's constituent Bars, is very difficult to understand.

[14] The same perplexity is created by his evidence that, in an effort to ascertain how he was allowed (by the terms of the order) to practise, he sought advice from, *inter alios*, the Chairman of the respondent, the Law Society of the Cape Province, the Law Society of the Transvaal, a professor in the Department of Civil Procedure at the University of Pretoria and Advocates Van der Spuy SC, De Freitas and Klein of his Association. He offered, as a reason for these consultations (in his answering affidavit):

'om uitklaring te kry watter instruksies en regsdienste Advokate inderdaad in Suid-Afrika mag lewer en die terme darvan, sodat die Agbare Hof se bevel nagekom word'.

The appellant did not say that he told any of the persons whose advice he sought that the court order permitted him to do the work of an attorney. Indeed it seems clear that he did not. On the probabilities it was the putative order that he discussed with them since it was that 'order' which invited such questions and not the order which actually bound him.

[15] The appellant replied in writing to a letter addressed to him by a magistrate in February 2000 complaining, *inter alia*, that he had performed

work usually performed by an attorney. He defended himself by denying that he accepted instructions directly from clients and stating that he was furnished with instructions from attorneys in so far as necessary but he made no mention of the court order which should have been the obvious point of reference.

[16] In April 2000 a member of the Cape Bar wrote to the Secretary of the Cape Bar Council drawing to her attention specific instances where the appellant had carried out the work of an attorney (including signing applications, a summons, a notice of address for service and an application for summary judgment as well as negotiating and signing a deed of settlement). The appellant was invited by the Bar Council to respond to the complaints. He replied on 23 May 2000. He emphasized that he acted on all occasions under instructions from attorney Fourie of Pretoria but made no mention of the order which would, on his reading of it, have provided substantial justification for his explanation.

[17] The appellant was represented at the hearing in the Court below by counsel. No attempt was made to persuade that Court that the appellant had acted in reliance on the terms of an order which supposedly permitted him to undertake any work of an attorney.

[18] The appellant relied for the first time on the terms of the issued order in his application to lead further evidence, his affidavit in that regard being attested on 19 July 2002. He there states that his whole case on appeal to

the Court of first instance was presented on the mistaken premise that the 'order' that the respondent had annexed to its papers was the correct order and that his own interpretation and understanding of it was incorrect. He continued:

'41. Due to time constraints, and the fact that it never crossed my mind that the Respondent would use the incorrect order, I never examined the papers to establish that the correct order was being used.

42. I argued vigorously with my legal representatives who insisted that I had violated the Court Order and who wished me to ameliorate my position by throwing myself on the mercy of the court. With the benefit of hindsight, this was obviously because they had the incorrect draft Order, attached by the Respondent to their Application "JJG5", to hand at the time of taking instructions.

43. I clearly instructed my legal representatives that I did not contravene the first order as I did not take instructions directly from the public, but through the medium of an attorney, nor did I perform any work without being properly instructed by an attorney.

44. It is important, with respect, to note that my clear and unequivocal instructions to all my legal representatives from the outset, was to prepare a proper case and argument on the following basis:

(i) If an attorney gives an advocate instructions to do something and he does so, the performance of such instructions is the performance thereof in his capacity as an advocate, and thus he is executing advocates' work.

Accordingly my conduct was not unprofessional and/or unlawful, for it was not in contravention of any Act.

(ii) The De Freitas and Van der Spuy cases differed in essence for they did attorneys' work without a brief, where I had an instructing attorney.

45. These two essential points were not addressed in any way.'

The content of paras 43 and 44 is entirely unconvincing. First, it requires the Court to accept that the appellant, a practising advocate, in a matter of the gravest personal concern to himself, deposed to an answering affidavit which he knew to be a false reflection of his case or without paying reasonable attention to its content. Second, it is inconceivable that the argument with his legal representatives to which the appellant refers would not have led to the discovery that he and they were at cross purposes about the substance of the order. If the appellant had possessed the slightest faith in his version he could have confirmed it or disabused his mind of the wrong impression by the simple expedient of perusing the court file. Third, the state of mind which the appellant attributes to himself at the time of preparing the case flies in the face of his reactions to the complaints to which I have already referred and is inconsistent with the basis upon which he sought advice as to the scope of professional activities permitted to an advocate.

[19] There is another serious inherent improbability in the proposed new evidence. It requires acceptance that the court order that was made was indeed the subject of agreement during the settlement. I have already pointed out that the respondent's Chairman deposed that the order put up by the respondent reflected the agreement and that the appellant did not

deny this. In his proposed new evidence he does not deal with that apparent concession saying only that he relied on the order as made. Given its strong opposition to the performance by the appellant of the work of an attorney which is manifest in its papers in the first application, it seems very unlikely that the respondent would have yielded the principle in the settlement purely to secure an undertaking which allowed the appellant to do the same work under brief. It is almost as incredible that the appellant could have believed that the respondent intended to make such a concession. For him it would have represented a signal triumph not afterwards to have kept silent about.

[20] Perhaps just as improbable is the fact that the all-embracing language of the order was also at odds with the existing law, knowledge which could hardly have escaped the attention of the experienced judge who made the order. Given its literal meaning it impermissibly authorized the appellant to do anything within the field of practice of an attorney including receiving and holding the money of clients (see *Society of Advocates of Natal v De Freitas and Another* 1997 (4) SA 1134 (N) at 1168E-1169E), negotiating his own fees with the client (a practice impliedly frowned on in *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (A) at 605H), signing and serving notices, furnishing the advocate's address for service of process and writing letters for clients (*General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T); *De Freitas, supra*, at *1173G-H).* That

interpretation ignores the fundamental differences between the two professions recognized in *In re Rome* 1991 (3) SA 291 (A) at 306 and *Society of Advocates of Natal v De Freitas and Another*, *supra*, at 1161F-1162A and 1167D-1168A. It also ignores the cautionary note in *Pretoria Balieraad v Beyers* 1966 (1) SA 112 (T) at 115 E that the infringement by advocates and attorneys on to territory which is properly the domain of the other would make co-operation between them impossible.

[21] Counsel, rightly, did not submit that any aspect of the totality of the evidence already before the Court in the appeal or contained in the proposed new evidence raises a probability that such evidence is true or should be accepted.

[22] The conclusion on this application must be that the new evidence is inherently improbable (and opportunistic). The fact that it was raised at all reflects badly on the appellant. The evidence is certainly not such as would, if adduced, be practically conclusive. Moreover, even if one were to accept that the appellant and his legal representatives held divergent views about the terms of the order which was made in consequence of the settlement, the failure to identify the correct order in the Court *a quo* was entirely due to the appellant's want of due diligence in perusing the affidavit to which he deposed or in following up the original order made by King JP.

[23] The application to adduce new evidence must be dismissed. The application for condonation of the late filing of the appellant's notice of appeal which we granted without opposition at the commencement of the appeal and the application to lead new evidence were embodied in a single affidavit. Counsel for the respondent did not seek a costs order in his client's favour in relation to the condonation but there is no reason why the usual order should not follow the dismissal of this application.

[24] The main submission of appellant's counsel on the merits of the appeal was that, irrespective of the existence of an enabling court order, the appellant was entitled in law to carry out any and all the work of an attorney provided that he was mandated by an attorney to do so. In that case, he submitted, the existence of the brief rendered whatever work was the subject of the instruction the proper work of an advocate. This he submitted was consistent with the insistence that the profession of an advocate is one of referral.

[25] The decision as to what constitutes the proper work of an advocate is, as pointed out by this Court in *Beyers v Pretoria Balieraad*, *supra*, at 605D, largely a question of impression and experience. Speaking for myself, in more than twenty years of practice at the Bar, including more years than I care to remember in the environment of the magistrate's courts, I never found myself in doubt as to where the boundaries should be drawn. The other members of this Court all share meaningful experience of a

greater or lesser extent in the practice of an advocate. Reasons of public policy and practicality supplement experience and enable one to identify where the dividing lines naturally fall.

[26] A convenient starting point is the reality of two distinct professions engaged in different fields of legal expertise. People choose to become attorneys or advocates not because they are forced to select one profession or the other but because of the different challenges which they offer, one, the attorney, mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where administrative skills are often important, the other, the advocate, court-based, requiring forensic skills, at arms length from the public, individualistic, concentrating on referred problems and usually little concerned with administration.

[27] The training of each profession is different and results in different skills. That of an attorney demands that a candidate serves lengthy articles and is exposed to a wide range of activities from accounting through drawing commercial documents to corporate takeovers. In so far as litigation in the High Courts is concerned, the primary emphasis is not on forensic skills but rather on case management. A candidate attorney is required to undergo a number of practical courses designed for the demands of the profession and which bear hardly at all on the equivalent demands of the profession of the advocate. The upbringing of an advocate, by contrast, is essentially directed to court skills and the paper work which

necessarily precedes the exercise of such skills. Even the extensive ethics training bears little relevance to the practice of any but the profession of advocacy. The result of this divergence is (or should be) the production of two classes of professionals each skilled in its chosen field but not substantially equipped to operate in the sphere of the other profession. It hardly needs stressing that attorneys usually provide the infrastructure appropriate to the nature of their practices. An advocate, by contrast, does not keep office hours or provide a secretary in attendance on the public and is not equipped to deal with debtors who arrive to pay or negotiate.

[28] At this point the referral rule and its implications (as to which see *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 756C-760I and 764C-765A and *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) at 620C) become significant. An advocate in general takes work only through the instructions of an attorney. The rule is not a pointless formality or an obstacle to efficient professional practice, nor is it a protective trade practice designed to benefit the advocacy. The rule requires that an attorney initiates the contact between an advocate and his client, negotiates about and receives fees from the client (on his own behalf and that of the advocate), instructs the advocate specifically in relation to each matter affecting the client's interest (other than the way in which the advocate is to carry out his professional duties), oversees each

step advised or taken by the advocate, keeps the client informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not take counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his client or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established rule of practice to that effect (which is the case with certain High Court pleadings but finds no equivalent in magistrates' court practice). The advocate does not communicate directly with any other person, save opposing legal representatives, on his client's behalf (unless briefed to make representations), does not perform those professional or administrative functions which are carried out by an attorney in or from his office, does not engage in negotiating liability for or the amount of security for costs or contributions towards costs or terms of settlement except with his opposing legal representative and then only subject to the approval of his instructing attorney. (This catalogue does not purport to be all-

embracing. It is intended only to illustrate the sharpness of the divide and to point the answer to other debates on the same subject.)

[29] It follows from the preceding overview that an instruction by an attorney to represent a client is not a proper instruction if-

(a) it is not specific in identifying the work to be carried out by the advocate;

b) it confers on the advocate a general discretion to litigate on behalf of his client;

(c) it expressly or impliedly authorises the advocate to by-pass the attorney or to run litigation without the particular participation of the attorney which I have described;

(d) it purports to authorise counsel to carry out any function which is not the proper function of an advocate or is properly the function of an attorney in the sense that it would normally be carried out only by an attorney or in or from his office.

[30] Counsel submitted that the division of work between the professions was arbitrary and irrational and constituted an unreasonable limitation on his client's right to practise his profession now enshrined in s 22 of the Constitution. But that begs the question. The appellant has the right to become an attorney or an advocate but he has no right to redefine the limits

of either profession. He cannot complain that he is not being permitted the free exercise of his right if he is unwilling to practise within the acknowledged or accepted scope of the profession. But in any event, as I have attempted to show, the division is anything but arbitrary or irrational and has been observed and developed over many years as the means of enabling both professions to represent the interests of the client to the best of the particular practitioner's ability according to his training and skills. The client does not engage an advocate to look after the attorney's interests or to exercise the attorney's skills nor should he pay the advocate to do so. Certain obvious benefits accrue to the client from the strict maintenance of the division of the professions. Looked at from the side of the advocate these can be identified as-

(1) the encouragement of independence of thought and action, and candour and objectivity in advice;

(2) the avoidance of emotional involvement or friction with the client, both of which failings can seriously undermine proper professional service; attorneys by contrast often have ongoing business or professional relationships with their clients;

(3) a clear division of responsibility allowing the advocate to serve the client expertly without the likelihood of conflict or compromise with his instructing attorney;

(4) avoidance of financial involvement with the client and the likelihood of dispute about fees or their recovery;

(5) the receipt of instructions which have been filtered through the attorney for relevance and importance and directed by the attorney to an advocate known by the attorney to be skilled in the particular field in which his client requires assistance;

(6) in a good working relationship between advocate and attorney, an effective, efficient and complementary pooling of skills and knowledge in which the client benefits by more than the mere sum of the parts.

[31] I have not attempted to address the vexed question of whether, in pure financial terms, the division between the existing professions benefits or prejudices the client. No information was placed before us nor was the matter debated. It must be obvious that any question of what serves the public interest best cannot be determined merely by reference to any one aspect, such as cost, but must be assessed upon an overall conspectus of relevant factors. Such balance as one is able to strike suggests to me that the existing public interest is, in general, best served by the established division of the professions, (cf *De Freitas*, *supra*, at 756H) albeit that abuses in the practices on both sides of the line sometimes suggest otherwise. I, therefore, find no reason to uphold the constitutional argument.

[32] Counsel submitted that none of the allegedly unprofessional conduct of the appellant was 'calculated, if generally allowed, to lead to abuses in the future': *Pienaar and Versfeld v Incorporated Law Society* 1902 TS 11 at 16; *De Freitas*, *supra*, at 763D-E.

[33] I do not agree. The inherent evils in allowing a practising advocate to sign summonses, notices of motion and affidavits and to furnish his own address for service of process and a contact telephone number are, put simply, that the capacity in which he acts is thereby blurred (or tends to become so) in his own perception and that of his client and in the perception of his opponent. When the advocate becomes uncertain his objectivity and independence is susceptible of compromise; he is tempted to charge for functions which are not properly his[1]; the client, to whom the distinction is not apparent anyway, begins to treat counsel as he would his attorney and expects the services of an attorney. His opponent, having little choice, is bound to equate the two. The client unwittingly suffers the loss of the advantages which I have referred to above without a corresponding gain in service.

[34] The suggestion, which is to be found in the affidavits and in counsel's heads of argument, that the practical reality of an instructing attorney a thousand kilometres distant and therefore incapable of carrying out his or her proper functions in person, excused or justified the

1 The two summonses prepared and signed by the appellant which are included in the appeal record are endorsed with the amounts of the attorney's fees allowed by the tariff and the defendant is informed that these form part of the costs which are being claimed from him.

appellant's conduct is untenable. The attorney's incapacity is not the concern of the advocate and cannot, by implication, broaden the advocate's mandate to authorise the carrying out of work which falls outside his or her professional competence.

[35] The aforegoing discussion leaves no doubt as to the proper domain of the challenged activities of the appellant which are the subject of the appeal. The signing of the summonses and notice of motion and the furnishing of the name, address and telephone number of the legal practitioner on such documents belong among the bread and butter activities of an attorney. Nor can the context of his conduct be ignored: a nominal instructing attorney in Pretoria, clients in the Cape (one being the company for whom the appellant had previously worked as a legal adviser), an obvious expectation that the attorney would do no more than discuss the matters with counsel if he called upon her to do so, while he would drive the litigation. The appellant showed a complete lack of insight into his proper professional role. Confused he may have been, but having chosen to practise in a particular field of expertise he was guilty of negligence in failing to equip himself with the necessary knowledge to enable him to do so properly and within the legal and practical constraints of the profession.

[36] Some attempt was made by his counsel to mitigate the appellant's failure to furnish his attorney's name and address on two notices of motion, thereby creating the impression that he was acting uninstructed by an

attorney. The Court *a quo* , with some understandable hesitation, accepted the appellant's explanation that an error between his computer and the printer led to the omission of that information. It was submitted that he only became aware of this when it was drawn to his attention (shortly after service and filing) and that he immediately remedied the matter. The Court *a quo* found that he must have known of the error as soon as it was made, but that he nevertheless allowed (undertook) the service without correcting the documents. Such evidence as the appellant placed before the Court *a quo* supports that finding. The appellant deposed that

'23.3 Die aansoeke van 16 en 17 Februarie 2000, was albei in konsep gereed op 16 Februarie 2000. Die verduideliking met betrekking tot die weglating is in kort, dat daar 'n onverklaarbare weglating met die rekenaar plaasvind, waartydens die sinsnede wat aandui dat die Opdraggewende Prokureur Louanda Fourie is, nie uitgedruk is nie. Die Respondent nie 'n rekenaardeskundige is nie en geen kennis gehad het hoe om die problem te herstel nie. Die Respondent het direk hieropvolgend die tekortkoming reggestel deur 'n Kennisgewing van Betekeningsadres te liaseer en te beteken, soos blyk op bladsy 40 van AANHANGSEL "JJG8", welke dan ook deur die geagte Landdros aanvaar is.'

(The underlining is mine.)

Although the appellant said in a letter to the Cape Bar Council on 23 May 2000 that the error 'is met vasstelling direk daarna reggestel' he failed to confirm under oath that he only discovered the error after causing the documents to be served and filed.

[37] Counsel for the appellant further submitted that the rules of professional practice could not override the statutory authorisation of his client's conduct which, so he said, was to be found in s 1 and Rules 2(1) and 52(1)(a) of the Magistrates' Court Act 32 of 1944. This is the argument which was put forward in *Society of Advocates of Natal v De Freitas and Another*, *supra*, and rejected by the Court (per Combrinck J at 1174D-1176D) in a carefully motivated judgment with which I fully agree. I would merely add in amplification of the concluding remarks of the learned Judge that s 83(8)(a)(v) of the Attorneys Act 53 of 1979 renders it an offence for any person other than an attorney, notary or conveyancer to draw up or prepare or cause to draw up or prepare (for any fee, gain or reward, direct or indirect, or in expectation of such)

'any instrument or document relating to or required or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Republic'.

Section 83(12)(f) exempts from the prohibition in s 83(8) any practising advocate

'in so far as he would be entitled but for the passing of this Act to draw or prepare any of the aforesaid documents in the ordinary course of his profession'.

As I have attempted to show, by that criterion, the appellant must fail.

[38] In the result the appellant has failed to persuade me that the Court *a quo* erred in any of the conclusions which it reached. He was properly found guilty of unprofessional conduct in the respects set out in the judgment of that Court.

[39] Although counsel submitted that the punishment imposed on the appellant exceeded what was warranted in the circumstances he was unable to point to any misdirection in the judgment. The appropriate penalty in such a case is a matter for the Court which hears the application. This Court will not interfere in the absence of an arbitrary exercise of the discretion, the application of a wrong principle, proof of bias or a closed mind, or unless no well-grounded reasons existed for the action taken: *Beyers v Pretoria Balieraad, supra,* at 605G. No such criticism has been directed to the judgment of the Court *a quo* in this appeal. It follows that the suspension order must stand.

[40] The following order is made:

1. The appeal is dismissed with costs including the costs of the application for condonation on an unopposed basis and the costs of the application to adduce new evidence.

2. Paragraph 2 of the Order of the Court *a quo* is varied to provide that the suspension of the appellant from practising is to commence on 1 November 2003.

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J A HEHER

JUDGE OF APPEAL